

- C. To determine the effect of the foregoing issues on the qualifications of Scripps Howard Broadcasting Company to hold a Commission license for Channel 2 in Baltimore.

The Judge placed both the burden of proceeding and the burden of proof on Scripps Howard.

25. With respect to Ms. Covington's notes, the Judge observed in his Scripps Howard MO&O that "[t]he involvement of her notes in the preparation of the renewal exhibit was not disclosed until the exchange of testimony on September 13, 1993, in a footnote [footnote 6] to Ms. Barr's frozen testimony." Scripps Howard MO&O, para. 10. The Scripps Howard MO&O further stated:

There also is a substantial question of candor raised with respect to the representation made in the letter of July 13, 1993 (copies of which were directed to Bureau counsel and the Judge), that Ms. Covington had been contacted to learn whether she possessed the notes. At that time, Scripps Howard knew that Covington's notes had been discarded by Ms. Barr. Yet that fact was not disclosed to the parties and the Presiding Judge prior to hearing. On June 13, 1993, Four Jacks served a Motion For The Production of documents which requested: "documents describing the conduct and results of ascertainment efforts." In Order FCC 93M-400, released June 24, 1993, Scripps Howard was directed to produce copies of all documents relating to the Issues/Programs lists.

The documents were required to be produced to Four Jacks on June 28, 1993. Id. Ms. Barr was scheduled to be deposed on July 16, 1993. Under those circumstances, Four Jacks and the Bureau were entitled to know before the deposition that Covington notes were prepared in 1992, that they were used to prepare an exhibit, and that they had been discarded. Scripps Howard was not authorized to determine for itself that the Covington notes

were protected work product and that therefore the fact of their use in the preparation of the exhibit and their subsequent destruction need not be disclosed. Therefore, the ambiguous disclosure to the parties and to the Presiding Judge on July 13, 1993, may have been calculated to mislead the Bureau and Four Jacks in their questioning on renewal ascertainment at the Barr deposition. (Scripps Howard MO&O, para. 11).

* * *

. . . The Covington calendar and the later notes were the subject of a document request of June 11, 1993. Three (3) days before the deposition, on July 13, 1993, Scripps Howard informed counsel for Four Jacks and Bureau counsel that Ms. Covington had none of the notes in her possession. But that representation was made without distinguishing between the 1991 calendar and the notes prepared from that calendar in 1992. Nor were the parties informed until Ms. Barr's cross-examination that the 1992 notes had been discarded. There was no effort made by Scripps Howard to gain custody of the 1991 calendar from Ms. Covington which now may be lost. Nor will Scripps Howard be heard to justify the failure to disclose the notes by asserting a work product privilege with respect to the 1992 notes which counsel did not request or give instructions with respect to preparation, custody or control In view of the totality of the circumstance, Scripps Howard's deposition testimony and correspondence with the Commission relating to the Covington diary and notes provide support for the adding of an issue of misrepresentation or a lack of candor.

(Scripps Howard MO&O, para. 13).

26. With respect to the NBC correspondence, the Scripps Howard MO&O stated:

The NBC documents were delivered within twenty-four (24) hours of a conference which had been called to rule on a request for an appeal from a ruling that had denied a subpoena for those documents. It had been represented to the Presiding Judge in a

pleading the day before the conference that the documents were not in Scripps Howard's possession, that they may not exist, and that a search for the documents would likely cause a delay of the hearing set for November 8, 1993. Yet the documents which were responsive to a motion to produce that was filed on June 11, 1993, were admittedly placed in the files of WMAR-TV in 1992, were readily found before the conference and were delivered to Four Jacks by noon of the very next day. Based on the cross-examination testimony of Ms. Barr, it became evident that the NBC documents were essential to her preparation of the renewal expectancy exhibit. Her testimony at her deposition was not forthcoming with respect to the existence of the NBC documents. In view of the totality of the circumstances, Scripps Howard's deposition testimony and pleadings relating to the NBC documents, and the failure to timely produce the documents in response to the Motion to Produce, support the adding of an issue of misrepresentation or a lack of candor.

(Scripps Howard MO&O, para. 12).

3. The "Discovery" of the Covington Notes

27. The Presiding Judge's Scripps Howard MO&O adding the misrepresentation/lack of candor issues against Scripps Howard was released on February 1, 1994. On February 9, 1994, Ms. Barr "discovered" a photocopy of the 1992 Covington notes, and on February 10, 1994, the original Covington notes were "discovered" in the files of Baker & Hostetler, Scripps Howard's FCC counsel, in Washington, D.C. Brett Kilbourne, a paralegal at Baker & Hostetler, conducted a search for the 1992 Covington notes on the

afternoon of February 10 which culminated in their "discovery" there. (Scripps Howard Ex. 36, p. 9; Four Jacks Ex. 29).^{4/}

4. The September 1994 Hearing On The Scripps Howard Misrepresentation/Lack of Candor Issues

(a) The Covington Notes

(i) The Preparation of the Covington Notes in the Summer of 1992

28. As noted previously, as part of her efforts during the summer of 1992 to document ascertainment, Ms. Barr asked present and former WMAR-TV employees for their 1991 personal calendars. Three individuals, in addition to Ms. Barr, had retained their calendars: Arnold J. Kleiner, Maria Velleggia, and Janet Covington. The purpose of Ms. Barr's request was to document WMAR-TV's ascertainment contacts during the License Term. Mr. Kleiner and Ms. Velleggia gave Ms. Barr their calendars. (Scripps Howard Ex. 36, p. 5).

29. Ms. Covington had retired from WMAR-TV at the end of 1991 and was no longer an employee when Ms. Barr contacted her. (Id.) When Ms. Covington left WMAR-TV, she took her calendars including her 1991 calendar. She did not take with her any kind

^{4/} Despite the fact that the MO&O placed both the burdens of proceeding and proof on Scripps Howard, Scripps Howard exchanged direct case testimony of only one witness -- Emily Barr -- and voluntarily produced only Ms. Barr for cross-examination. Scripps Howard objected to producing Janet Covington for cross-examination, and ultimately Ms. Covington's deposition was received in evidence in lieu of her hearing testimony. (Scripps Howard Ex. 38). Among personnel at Baker & Hostetler, only Brett Kilbourne was allowed to be cross-examined at the hearing.

of personal notes concerning ascertainment efforts at the station. (Scripps Howard Ex. 38, pp. 36-37).

30. When Scripps Howard became the licensee of WMAR-TV on May 30, 1991, Ms. Covington was Director of Public Affairs and she continued in that position until the end of 1991 when she retired. As Director of Public Affairs, Ms. Covington was responsible for reviewing public service announcements, putting out schedules and ascertaining the community, which she said meant going to meetings and dinners. (Scripps Howard Ex. 38, pp. 10-11). Ms. Covington claimed that she was involved in the preparation of the station's issues/programs lists, but when shown the second quarter 1991 issues/programs list (Scripps Howard Ex. 3, Att. F, pp. SH3-0352-0359), she did not recall having seen it and said "[t]his would be totally new." (Scripps Howard Ex. 38, p. 17). Similarly, Ms. Covington did not recall ever seeing the Third Quarter 1991 Issues/Programs list (Scripps Howard Ex. 3, Att. F, pp. SH3-0339-0351). (Id.)

31. In the summer of 1992, Ms. Barr called Ms. Covington and asked for her 1991 calendar. (Tr. 1588; Scripps Howard Ex. 38, p. 38). Ms. Barr claimed that she explained to Ms. Covington that she was compiling information about ascertainment contacts that had taken place in the summer of 1991. (Scripps Howard Ex. 36, p. 6). According to Ms. Covington, Ms. Barr said she needed the information because "those challenging the license wanted to know what ascertainment had been done." (Scripps Howard Ex. 38, p. 40).

32. At the November 1993 hearing, Ms. Barr had testified that Ms. Covington's handwriting and recordkeeping were "very

unique and difficult to decipher." (Tr. 589). According to Ms. Barr:

Ms. Covington stated that, as I knew from having worked with her, she kept her calendar in such a way that it would be difficult for anyone other than her to read or understand. I asked her to include in her notes the date of each meeting, the people with whom she met, and, to the extent her memory would allow, the subjects discussed.

(Scripps Howard Ex. 36, p. 6).

33. Ms. Covington testified that she did not write much in her calendar. (Scripps Howard Ex. 38, p. 40). The following colloquy took place at Ms. Covington's deposition:

Q. Can you explain for me why Ms. Barr would not be able to translate the information?

A. Because I might just have -- my calendar, if I knew from previous knowledge what this was today, I might just have it in my calendar the time and this place and the name and that would be all, and that wouldn't mean anything to anybody. They wouldn't know what had transpired or what I was doing here. I just needed enough to know where I was going and that's what was in my calendar.

Q. So --

A. What transpired then afterwards wouldn't be in that calendar, at the meeting.

Q. So when you said that it would have been difficult for Ms. Barr to understand your calendar, you mean because your notes were rather cryptic? They weren't complete?

A. Yeah, that's right.

Q. Not because your handwriting was, was poor?

A. Oh, that's poor too but that wasn't the real reason.

Q. And so when you wrote down a meeting you knew what the meeting was about but it might not be evident in your calendar?

A. It might not be evident to some other people, that's correct.

(Scripps Howard Ex. 38, pp. 42-43).

34. The original Covington notes ultimately produced by Scripps Howard after their "discovery" on February 9, 1994 contain handwriting that is very legible. (See Scripps Howard Ex. 37). With regard to the content of the notes, Ms. Covington admitted that everything was "based on recollection" since the calendar "just had the date and the name of a person or whatever was needed for me to keep the meeting." (Scripps Howard Ex. 38, p. 120). Ms. Covington admitted that she did not write much in her calendar. She had no written information apart from her calendar. (Scripps Howard Ex. 38, pp. 40-41).

35. Ms. Covington prepared her notes in the summer of 1992 based on the dates in her calendar and her recall. (Scripps Howard Ex. 38, p. 47). She did not recall whether she prepared all of the notes at one point in time (Id., p. 44). As produced by Scripps Howard, the first five pages of the Covington notes (numbered 1-5) cover the period September 3 - September 28 and the next four pages (separately numbered 1-4) cover the period June 3 - August 23. (Scripps Howard Ex. 37 and Ex. 36, Tab C). Ms. Covington initially said she did not recall whether she looked at one period of time first in preparing the notes, but later said she might have written one set of notes first and

another later. (Scripps Howard Ex. 38, pp. 51 and 117).^{5/} Ms. Covington could not explain at her deposition why the notes for September were more detailed than the notes from June 3 through August 23, but she doubted that her calendar was more detailed in September. (Scripps Howard Ex. 38, p. 54).^{6/} She said that where there were no entries in the notes, there were no entries in the calendar or she was on vacation. (Id., p. 72).

36. Ms. Barr testified that Ms. Covington dropped her notes off at Ms. Barr's office and that she later called Ms. Covington to thank her for the notes and to ask her to stop by the office during her next visit to the station so they could review the notes together. Ms. Barr maintained that she and Ms. Covington discussed the 1992 notes in person on at least one occasion; that Ms. Barr made sure she understood the notes; and that Ms. Covington merely clarified the information contained in the notes. It was Ms. Barr's testimony that she spoke to Ms. Covington on the telephone quite often in the months after she received the notes about a wide variety of subjects, and that it is "highly probable" that she asked Ms. Covington additional questions about the 1992 notes during one or more of those conversations. (Scripps Howard Ex. 36, pp. 6-7; Tr. 1596-97).

37. On the other hand, Ms. Covington does not drive and she said that her husband dropped off the notes at the station. She

^{5/} Ms. Barr did not recall in what order she received the notes or whether Ms. Covington gave her the June 3 - August 23 notes at the same time as the September notes. (Tr. 1598).

^{6/} Counsel for Scripps Howard refused to permit Ms. Covington to answer additional questions in this area at her deposition (Scripps Howard Ex. 38, p. 120), and opposed cross-examination of Ms. Covington at hearing.

did not recall sitting down with Ms. Barr at all to discuss the notes on any subsequent occasion in 1992 and did not recall being contacted by Ms. Barr again about the notes in the summer of 1992. (Scripps Howard Ex. 38, pp. 44-48, 94).

38. Ms. Covington prepared her calendar for upcoming meetings. She did not always know who she would talk to and she did not write down any information about what occurred at meetings. (Scripps Howard Ex. 38, pp. 65-66). She never put down in her calendar what programming resulted from a particular contact, and after she gave Ms. Barr her notes, she never discussed with Ms. Barr what programs WMAR-TV aired in 1991 in response to a particular contact or in response to specific issues. (Scripps Howard Ex. 38, pp. 57-58). In contrast to Ms. Covington's testimony, Ms. Barr claimed at the November 1993 hearing that she "discussed with [Ms. Covington] what the meetings were about, who she met with, what was discussed at those meetings, where they took place and what, if any, programming resulted from those meetings." (Tr. 664, 689).

39. After she received Ms. Covington's 1992 notes, Ms. Barr made several marks on the notes to reflect which entries she considered appropriate for inclusion in the ascertainment exhibit that she was preparing. Ms. Barr checked off the items that she considered appropriate and omitted from consideration those that she did not believe were pertinent or that contained insufficient information. The Covington notes were used in the preparation of Attachment E to Ms. Barr's direct case testimony. In the late summer and early fall of 1992, Ms. Barr worked on Attachment E and sent several drafts of Attachment E to Baker & Hostetler and

worked with them to finalize the attachment. (Scripps Howard Ex. 36, p. 7; Tr. 1599).

(ii) Storage of the Calendar and Covington Notes

40. In her September 1994 testimony, Ms. Barr stated that after she completed Attachment E, she left the materials that she had used in preparing it, including Ms. Covington's notes and the calendars of herself, Mr. Kleiner, and Ms. Velleggia, in a pile on the floor of her office. (Scripps Howard Ex. 36, p. 7; Tr. 1599). The calendars and notes stayed on the floor of Ms. Barr's office for a period of time. (Tr. 1601). In early 1993, Ms. Barr got a two-drawer gray metal standard file cabinet. She made files for everything that had been collecting in her office relating to this case, and she had the two-drawer file cabinet in her office during 1993. (Tr. 1601-02). Ms. Barr claimed that she did not recall specifically placing Ms. Covington's notes or the calendars of herself, Mr. Kleiner and Ms. Velleggia in the file cabinet, although she did recall creating a file for personal calendars and knew from her subsequent review of the files that the calendars were there. (Scripps Howard Ex. 36, p. 8). The label on the file read "Personal Calendars." Ms. Barr said that the purpose of getting a file cabinet was to organize things so she could find them more easily. (Tr. 1603). By late 1993 or early 1994, the documents related to this case were too numerous to store in the two-drawer file cabinet, and Ms. Barr obtained a larger file cabinet. (Scripps Howard Ex. 36, p. 8).

(iii) Events in the Late Spring and Summer of 1993

41. At the request of Baker & Hostetler in the spring or summer of 1993, Ms. Barr began to review her files for the purpose of producing documents to Four Jacks. She was instructed to turn over to Baker & Hostetler all documents that she thought were potentially responsive to the Motion for Production of Documents filed by Four Jacks on June 11, 1993, and Ms. Barr said she provided Baker & Hostetler with all of the documents that she considered relevant at the time. (Scripps Howard Ex. 36, p. 8). In connection with the documents that Ms. Barr sent Baker & Hostetler in response to Four Jacks' discovery requests, Ms. Barr said that it was her practice to send originals and keep copies. (Tr. 1610).

42. In her direct case testimony at the September 1994 hearing, Ms. Barr stated:

Thereafter, Baker & Hostetler requested that I forward the calendars of myself, Mr. Kleiner, Ms. Velleggia and Ms. Covington. I informed Baker & Hostetler that I had not used Ms. Covington's calendar in preparing Attachment E, and that I had used handwritten notes that she had prepared in 1992 and provided to me. I forwarded calendars of myself, Mr. Kleiner, and Ms. Velleggia to Baker & Hostetler as I had been instructed. I do not recall sending Ms. Covington's 1992 notes to Baker & Hostetler, although I now know that I sent them, also. I kept copies of the calendars of myself, Mr. Kleiner and Ms. Velleggia. I do not recall ever making a copy of Ms. Covington's notes or requesting that my secretary make a copy of them, although I now know that one was made at WMAR-TV.

In addition, in the spring or summer of 1993, Baker & Hostetler requested that I obtain Ms. Covington's 1991 calendar from her.

(Scripps Howard Ex. 36, p. 8).

43. Previously, however, at her July 1994 deposition, when asked if she had told counsel in June 1993 that she had the handwritten notes, she had responded, "I don't recall" and her counsel then interposed an objection. (Tr. 1611-12). At the July 1994 deposition, Ms. Barr further stated that

as I was gathering documents for counsel in anticipation of the hearing and I guess the deposition, I told them that Janet Covington could not -- did not have her calendar I told them that I got the information from notes. But I was asked, at that point in time, to ask Janet if I could have her calendar, her original calendar.

(Tr. 1612-13). Ms. Barr called Ms. Covington on at least two occasions and told her she needed the calendar, but Ms. Covington was unable to locate it. (Scripps Howard Ex. 36, p. 9; Tr. 1613, 1732-34). Ms. Covington did not recall when Ms. Barr called to request the calendar. (Scripps Howard Ex. 38, pp. 45, 55-56).

44. In June or July of 1993, David N. Roberts,^{1/} then an attorney with Baker & Hostetler, visited Ms. Barr's office to look for documents responsive to Four Jacks' June 11, 1993 motion for production of documents. Mr. Roberts reviewed all of the files in Ms. Barr's office that related to the case. (Scripps Howard Ex. 36, p. 9).

^{1/} Mr. Roberts left Baker & Hostetler in the fall of 1993 and took a position in the Cable Services Bureau of the FCC. Four Jacks' attempt to depose Mr. Roberts concerning the issues in this proceeding was denied by the Commission. See MO&O, FCC 94-213, released September 15, 1994.

(iv) The June 25, 1993 Memo

45. Ms. Barr's September 2, 1994 written direct case testimony contains a copy of Ms. Covington's notes as Attachment C and, as Attachment D, a copy of a "post-it" note that Ms. Barr had written when she forwarded the Covington notes to Baker & Hostetler on June 25, 1993 along with a memorandum that she had prepared. The post-it note said: "Janet Covington's original notes to me regarding appointments/ascertainments. She did not save her original calendar."

46. Conspicuously missing from Ms. Barr's direct case testimony is a copy of the June 25, 1993 memorandum that accompanied the Covington notes and Barr's "post-it" note. That memorandum is addressed to Mr. Roberts, and is entitled "re: Request for Documents." (Four Jacks Ex. 31). The memo states in relevant part:

Attached please find the original documents you requested earlier this week. The following items are included:

The Morning Show: Memos and personal notes regarding its development and implementation.

Personal Calendars: Janet Covington's original notes to me were prepared specifically for this license challenge issue but she did not save her actual calendar. . . .

Copies of the June 25, 1993 cover memo were sent to Arnold Kleiner, then the General Manager of WMAR-TV; Terry Schroeder, a Corporate Vice President of Scripps Howard; and Frank Gardner, President of Scripps Howard. (Four Jacks Ex. 31).

47. When questioned about the June 25, 1993 memo at the September 1994 hearing, Ms. Barr testified that she attached the

original calendars of Mr. Kleiner, Ms. Velleggia and herself and sent them to Mr. Roberts at Baker & Hostetler. Since she was unable to obtain Ms. Covington's calendar, Ms. Barr sent the original Covington notes with the June 25, 1993 memo. She made copies of the calendars but did not recall making a copy of the notes -- even though it was her practice to keep copies if she sent original documents. (Tr. 1607-10, 1613).^{8/} Ms. Barr conceded that the Covington notes were the equivalent of the calendars. (Tr. 1597-98). Ms. Barr also recalled telling counsel in June 1993, as she was gathering documents, that Janet Covington did not have her calendar and that she had obtained the information from notes. (Tr. 1732-34).

(v) The July 13, 1993 Letter Regarding Document Production

48. On July 13, 1993, just 18 days after the June 25 memo was written, counsel for Scripps Howard forwarded to counsel for Four Jacks a letter transmitting additional documents. As described earlier, that letter stated:

Finally, Janet Covington, the former public relations director of WMAR-TV who retired in December, 1991, at one time possessed personal notes that recorded various ascertainment meetings in which she participated during the relevant period. These notes were not retained in any files at WMAR-TV. Scripps Howard recently contacted Ms. Covington to ascertain whether she possessed any of these notes and determined that she did not.

^{8/} Despite Scripps Howard's failure to make any timely work product claim with regard to the Covington notes and the Judge's express ruling on that point, (see Scripps Howard MO&O, para. 13), counsel for Scripps Howard attempted to argue at the hearing that the work Barr did with Covington was work product. (Tr. 1623).

(Four Jacks Ex. 30).^{2/}

49. In her September 1994 written direct case testimony, Ms. Barr admitted that she was shown a copy of the July 13, 1993 letter at her July 29, 1994 deposition and that the letter incorrectly implied that Ms. Covington had prepared her notes in 1991, rather than 1992. She claimed that she did not believe that she saw the letter before it was sent because it also identifies Ms. Covington as the "former public relations director" of WMAR-TV rather than the former director of public affairs, and she believes that she would have corrected the error in Ms. Covington's title had she reviewed the letter prior to its being sent by Mr. Howard. (Scripps Howard Ex. 36, p. 13). Ms. Barr did not state that she would have corrected the incorrect implication as to the year the notes were prepared or the incorrect statement that "[t]hese notes were not retained in any files at WMAR-TV." (*Id.*) Nor did Ms. Barr explain why the letter states that Ms. Covington "at one time" possessed personal notes when Ms. Barr and Scripps Howard knew the location of the notes eighteen (18) days earlier. Nor did Ms. Barr explain why the letter contains the statement that "Scripps Howard recently contacted Ms. Covington to ascertain whether she possessed any of these notes" when Ms. Barr testified that Scripps Howard had contacted Ms. Covington for her 1991 calendar -- not for her notes (*Id.* at pp. 8 and 13; Tr. 583). In fact, Ms. Barr

^{2/} When counsel for Four Jacks read this portion of the July 13, 1993 letter into the record at the November 1993 hearing, and sought to question Ms. Barr, counsel for Scripps Howard objected to questions on the passage and his objections were sustained. (Tr. 666-70).

testified that she never gave Ms. Covington's notes back to her. (Tr. 669).

50. In her November 1993 hearing testimony before the issues were added, Ms. Barr had represented that she had thrown the notes in a wastebasket. (Tr. 583). The following testimony also occurred during the November 1993 hearing:

Q. Why did you ask your counsel in 1993 if the term "document" [as used in Four Jacks' June 1993 motion for production of documents] implied handwritten notes?

A. I just wanted to make sure that I had given them every single thing that they had asked for.

Q. Well, did you have handwritten notes in your possession in 1993?

A. No, I was aware -- the only handwritten notes that I was aware of other than, you know, for example, this morning news document that you gave to me earlier, which are my handwritten notes, was that Janet Covington had given me handwritten notes. But I knew that I had not kept them. That was probably the reason why I asked.

(Tr. 587 (emphasis added)).

51. Ms. Barr's September 1994 testimony does not disclose why she did not reveal errors in the July 13, 1993 letter until September 2, 1994 -- the date direct case exhibits were exchanged. Ms. Barr testified that she has seen the July 13, 1993 letter several times (Tr. 1580-81), and the relevant paragraph of the letter was read during the November 1993 hearing when Ms. Barr was on the witness stand (Tr. 666).

(vi) Footnote 6 to Ms. Barr's 1993 Hearing Testimony

52. Footnote 6 to Ms. Barr's September 13, 1993 direct written testimony stated as follows:

The material in Attachment E was originally prepared in 1992 under my direction from information gathered by individuals working under my supervision. In preparing the attachment, I relied upon my own calendar and recollections and the calendars and recollections of Arnold Kleiner and Maria Velleggia. In addition, I relied upon discussions with and notes of Janet Covington, the former Public Affairs Director. At that time, Ms. Covington already was a former employee of the station who had volunteered to help me on her own time and who had kept these notes in her possession when she left the station. It did not occur to me to preserve Ms. Covington's handwritten notes after our discussions.

(Scripps Howard Ex. 3, p. 16, n.6). There is no mention of Ms. Covington's calendar in the footnote. (Id.).^{10/}

53. After Ms. Barr's revelations at the November 1993 hearing that the Covington notes were written in 1992 (Tr. 577-78) and that she had thrown the notes in a wastebasket (Tr. 582-83), Ms. Barr was questioned about the statement in footnote 6 that "[i]t did not occur to me to preserve Ms. Covington's

^{10/} In opposing Four Jacks' motion to reopen the record and add the present issues against it, Scripps Howard advanced the amazing claim that the references to "notes" in its counsel's July 13, 1993 letter and in footnote 6 of Ms. Barr's direct testimony actually connoted references to Ms. Covington's 1991 calendar. See Scripps Howard's Opposition to Petition to Reopen the Record and Enlarge the Issues (filed December 22, 1993), at 10-11. Later, in attempting to obtain summary decision on the issues, Scripps Howard weakly admitted that the "term 'notes' . . . may not seem as appropriate in hindsight as 'calendar' or 'diary,' when compared with Ms. Barr's testimony on cross-examination." See Scripps Howard's Motion for Summary Decision (filed February 10, 1994), at 14.

handwritten notes." Ms. Barr was specifically asked why the destruction of the notes was not disclosed in response to the Motion for Production of Documents. She testified that she didn't think it was a relevant issue. (Tr. 594).

54. In her September 1994 direct case testimony, Ms. Barr noted that she had been directed to footnote 6 during her deposition on July 29, 1994 and admitted that "[t]hat footnote contained an incorrect statement that Ms. Covington 'kept these notes in her possession when she left the station.'" (Scripps Howard Ex. 36, p. 13). The testimony in which the footnote appeared was prepared approximately two and a half months after Ms. Barr's June 25, 1993 memo to Mr. Dave Roberts transmitting the original calendars and the Covington notes along with the post-it with Ms. Barr's handwriting. Ms. Barr also had a conversation with counsel about Ms. Covington's handwritten notes prior to the time she wrote the June 25, 1993 memo. Despite the memo, the post-it, and the conversation, Ms. Barr claimed that the misstatement in her September 1993 testimony was "accidental." (Scripps Howard Ex. 36, p. 13). She knew, however, that the calendars had been saved. (Tr. 1676-77).

(vii) **The Belated Discovery of the Covington Notes
at WMAR-TV**

55. With respect to the "discovery" of the 1992 Covington notes, Ms. Barr testified that on February 9, 1994, she had a meeting with Stephanie S. Abrutyn, an attorney with Baker & Hostetler. (Scripps Howard Ex. 36, p. 9). She did not recall anything about the length of the meeting and could not say

whether it was one hour or four hours. (Tr. 1647-48). She also did not recall whether the meeting began in the morning or afternoon. (Tr. 1737). The meeting with Ms. Abrutyn on February 9, 1994 was the first face-to-face meeting that Ms. Barr had with anyone from Baker & Hostetler following the Judge's addition of issues. (Tr. 1650-51).

56. Ms. Barr stated in her September 1994 written direct testimony:

At one point during our meeting I went through my files to retrieve a memorandum that I had sent to Baker & Hostetler in order to refresh my recollection so that I could answer one of Ms. Abrutyn's questions. I reached for the file entitled "**MEMOS TO B&H**," located in the top drawer of the file cabinet containing materials relating to this case, to look for the memorandum.

While looking in the "**MEMOS TO B&H**" file on February 9, 1994, I discovered a memorandum prepared by me and dated June 25, 1993. I was not specifically looking for this memorandum, because I did not recall at the time that the June 25, 1993, memorandum existed, nor do I recall at this time exactly what I was looking for. When I was looking through the file, I noticed that attached to the June 25, 1993, memorandum was a photocopy of the 1992 notes that Ms. Covington had prepared and given to me. The copy of the 1992 Covington notes that I discovered also contained a cover sheet, which was a photocopy of a "post-it" note that I had written. . . .

My purpose in examining the "**MEMOS TO B&H**" file was neither to look for the 1992 Covington notes nor to look for anything that might help me to locate the 1992 Covington notes, because at the time, I believed that I had thrown away the 1992 notes and not retained any copies of them.

(Scripps Howard Ex. 36, pp. 9-10 (emphasis added)).

57. When questioned about the discovery of the notes at the hearing, Ms. Barr reiterated her direct testimony that the purpose of examining the "MEMOS TO B&H" file was neither to look for the 1992 Covington notes nor to look for anything that might help her locate the notes. (Tr. 1649-50). The following colloquy ensued:

Q. What was the purpose of looking at the "Memos to B&H" file?

A. I said earlier and I stated in my direct testimony, I went in, as near as I can recollect, to refresh my memory as to the date that I had sent something. I just don't remember what it was that I was looking specifically for. I remember Ms. Abrutyn asked me a question. I said let me see if I can remember when I sent that to you, meaning to counsel. And, and then I, you know, discovered this memo with these notes attached. And, frankly, at that point, you know, that sort of superseded anything I was looking for.

Q. Do you remember the subject of the memo you were looking for?

A. No. I just stated that I have no specific recollection as to what I was looking for, because I must tell you that as soon as I discovered those notes attach -- the copy of the notes attached to that memo, it really became kind of the paramount issue in my mind. I mean, I had really believed that I had thrown those notes away. I had no memory of saving them, no memory of copying them. And all of a sudden, there they were.

(Tr. 1652-54).

58. Yet, on February 15, 1994, Ms. Barr had signed a Declaration which accompanied a Motion for Summary Decision filed

by Scripps Howard seeking favorable resolution of the misrepresentation/lack of candor issues. In her February 15th Declaration, Ms. Barr stated the following with respect to her February 9, 1994 meeting with Ms. Abrutyn:

At one point during our meeting, I opened one of the file cabinets in my office to look for a memo that I had sent to Baker & Hostetler in order to refresh my recollection as to the date that I had sent the memorandum and other materials to Baker & Hostetler. A copy of this memorandum is attached hereto as Exhibit 1.

(Four Jacks Ex. 32; Tr. 1655 (emphasis added)). Exhibit 1 to Ms. Barr's February 15, 1994 Declaration was her memorandum to Mr. Roberts dated June 25, 1993 which states: "Attached please find the original documents you requested earlier this week." Among the documents attached were personal calendars and Janet Covington's original notes. (Four Jacks Ex. 31; Tr. 1655).

59. When confronted with her February 15, 1994 Declaration, Ms. Barr stated that the February 15th Declaration was true and correct. She thus admitted that on February 9, 1994, she was looking for the June 25, 1993 memo which was attached to the February 15, 1994 Declaration as Exhibit 1 (Tr. 1655-57, 1665-66).^{11/}

60. According to Ms. Barr's February 15, 1994 Declaration, when she opened one of the file cabinets in her office to look for a memorandum to Baker & Hostetler in order to refresh her recollection as to the date she had sent the memorandum and other

^{11/} On February 28, 1994 -- between the time of Ms. Barr's February 15 Declaration and her September 1994 hearing testimony, Four Jacks filed an Opposition to Motion for Summary Decision in which (at pp. 32-33) it discussed the profound import of Ms. Barr's June 25, 1993 memo.

materials to Baker & Hostetler, she immediately reached for the file entitled "MEMOS to B&H" to look for the memorandum (Four Jacks Ex. 31, p. 1, para. 2). Ms. Barr's direct case testimony, however, omits the word "immediately." (Scripps Howard Ex. 36, p. 9). Ms. Barr admitted that she had not made any attempt to look for the Covington notes after Four Jacks filed its Motion to Enlarge Issues until February 9, 1994 (Tr. 1669).

61. Ms. Covington testified that she did not remember if she was contacted by Ms. Barr in February 1994 concerning either her personal notes or her 1991 calendar. (Scripps Howard Ex. 38, p. 98). She has three of four calendars in her possession but no longer has the 1991 calendar. (Id., p. 38). At her deposition, Ms. Covington said that Baker & Hostetler was representing her but she did not recall when she discussed representation with Baker & Hostetler or whether she signed any kind of agreement with the firm. Ms. Covington thinks the owners of WMAR-TV are paying her legal fees in connection with this proceeding. (Scripps Howard Ex. 38, pp. 5-7).

62. Ms. Covington said she had a meeting with Ms. Abrutyn in relation to the "challenge" and to the notes which had been lost. The meeting was set up by phone or letter and took place at Channel 2. (Scripps Howard Ex. 38, p. 99). Ms. Barr introduced Ms. Covington to Ms. Abrutyn, and then Ms. Covington met alone with Ms. Abrutyn. The meeting took place on February 9, 1994, and Ms. Covington said the meeting occurred because of "her involvement and her notes and her being part of the ascertainment process." Ms. Covington heard that Ms. Barr had found a copy of the notes in one of her files, but there was no

discussion at the meeting about the original copy of the notes. Ms. Covington claimed that she could not remember what was discussed at the February 9, 1994 meeting or any other discussion about the notes. She could not recall any questions at the meeting with Ms. Abrutyn and did not know if Ms. Abrutyn made any notes during the meeting. (Scripps Howard Ex. 38, pp. 99-104, 107).

(viii) **The Belated Discovery of the Original
Covington Notes at Baker & Hostetler**

63. The original copy of the Covington notes was discovered on the afternoon of February 10, 1994 at about 3:45 p.m. or 4:00 p.m. at the offices of Baker & Hostetler in Washington, D.C. by Brett W. Kilbourne, a legal assistant at Baker & Hostetler. (Four Jacks Ex. 29; Tr. 1550). Mr. Kilbourne has a B.A. degree from University of the South and a paralegal certificate from Georgetown University. Maintaining files and retrieving documents are things he does frequently in connection with his employment at Baker & Hostetler. (Tr. 1512-13).

64. Mr. Kilbourne first worked on the Scripps Howard renewal case when he began employment at Baker & Hostetler in September 1991. (Tr. 1513). Mr. Kilbourne was involved in the effort to produce documents in response to the Four Jacks motion for production of documents in 1993. (Tr. 1514-15). Mr. Kilbourne was the only legal assistant at Baker & Hostetler maintaining documents in this case. (Tr. 1520).

65. The documents were forwarded by WMAR-TV during 1993 to Baker & Hostetler. (Tr. 1516-17). Mr. Roberts, an associate at

the firm, reviewed the documents to determine whether they were responsive to Four Jacks' document production request. Mr. Roberts forwarded the documents he deemed responsive to Mr. Kilbourne, and Kilbourne's job was to label the documents, make copies and file them. Mr. Kilbourne did not know the extent to which other Baker & Hostetler attorneys participated in the review of documents. Mr. Kilbourne made three copies of the documents -- one to be turned over to Four Jacks and the others to be retained in-house. He numbered the documents sequentially with Bates stamped numbers. (Tr. 1520-22, 1552). More recently, Mr. Kilbourne also developed an index but he did not recall when (Tr. 1523). The originals of the documents produced to Four Jacks were placed in boxes and Mr. Kilbourne put the boxes in a copy room on the 12th floor of the building occupied by Baker & Hostetler. (Tr. 1530-32, 1552). At some point thereafter in 1993, the originals of the documents produced to Four Jacks were moved out of boxes and put into a filing cabinet. (Tr. 1532).

66. A set of original documents not produced to Four Jacks was kept in a separate box which was not labeled and not indexed. This box of original non-produced documents was not placed in the 12th floor files until some time after the first few boxes were placed there. The box of non-produced documents was given to Mr. Kilbourne by Mr. Roberts, and Mr. Roberts instructed him to put the box in the files with the other original documents. (Tr. 1532-33). Mr. Kilbourne did not make copies of the non-produced documents in 1993, and the non-produced documents were not taken out of the box. (Tr. 1534).

67. At the hearing, Mr. Kilbourne said that on February 10, 1994 at about 3:00 p.m. when he returned from the FCC, he was stopped in the hallway by Ruth Omonijo, secretary for Kenneth C. Howard, Jr., the Baker & Hostetler attorney who is lead counsel for Scripps Howard in this case. Kilbourne first said that Ms. Omonijo asked him to search for two documents -- a memo from Emily Barr and for notes made by Janet Covington in 1992 (Tr. 1535). He said that though "[w]e had a rough date" of the memo to search by, Ms. Omonijo did not provide him with a copy of the memo. (Tr. 1539). Later, however, Mr. Kilbourne testified that when he found the memo from Ms. Barr to Mr. Roberts dated June 25, 1993, he was just looking for the memo and not for the Covington notes. He said Ms. Omonijo had asked him to get a memo "with the following date" and he couldn't recall whether she actually described the Covington notes (Tr. 1545-46).

68. Mr. Kilbourne undertook a search right away. The first place he went was to files on the 11th floor of Baker & Hostetler's building containing copies of the documents produced to Four Jacks. It took him about a half hour to review the files on the 11th floor and he did not find the documents there. (Tr. 1539-40). He next went to the filing cabinets on the 12th floor where the original documents were kept. Mr. Kilbourne testified that he started looking through the filing cabinets and found what he was looking for in less than fifteen minutes. (Tr. 1541). Upon further questioning, Mr. Kilbourne said he found the documents in a box marked "documents not produced"; it was the only box in the filing cabinet; and the box was right on top of the first drawer that he opened in the filing cabinet (Tr. 1541-